No. 91-946

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA and FRANK S. ZOLIN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Dated: July 27, 1992

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REPLY BRIEF FOR THE PETITIONER

The Brief for the United States begs the central questions in this case -- whether a live concrete controversy remains between the parties and whether *any* effective relief remains available to the petitioner should it prevail on the merits. Instead, the government argues repetitively and irrelevantly that the district court's subject matter jurisdiction is limited to whether to order production of the summoned information, but it fails to address the appellate court's role if the district court decision concerning the direct subject matter of its jurisdictional grant is erroneous. Moreover, the government ignores the numerous cases that hold that government access to documents does not moot an appeal because of the availability of effective relief through return of all copies of the tapes in the possession of the government, as petitioner has requested. Rather than confront this key issue, the government argues that it would be

"premature" to "suppress" the government's introduction of the tapes in a subsequent proceeding, which is merely one possible form of relief, and which petitioner has not sought. The government further ignores or distorts the clear holding of numerous cases that disclosure of documents to the government or compliance with an enforcement order does not moot an appeal because, in addition to return of the documents, the courts may order no further use or disclosure of the documents in an ongoing investigation. Finally, the government's superficial response to petitioner's explanation that *disinterested* third party compliance with a summons enforcement order does not moot the *taxpayer's* appeal distorts the case law and fails to address the relevant principles of mootness doctrine.

I. THE EXTENT OF THE JURISDICTIONAL GRANT OF 26 U.S.C. §§ 7402(b), 7604(a), DOES NOT DETERMINE WHETHER A POST-COMPLIANCE APPEAL OF AN ERRONEOUS SUMMONS ENFORCEMENT ORDER IS MOOT

The core of the government's argument is that the subject matter jurisdiction of the district courts under 26 U.S.C. §§ 7402(b), 7604(a)[1/] is limited to determining whether to compel production of the requested information. Brief For the United States at 8, 11-12, 15-17 (hereinafter "Gov. Br. at _____").[2/] From this unremarkable proposition, the government leaps to the *non sequitur* that, once the district court issues an enforcement order, however erroneous, and once a disinterested third party complies with that order, the case or controversy between the government and the taxpayer comes to an end. Gov. Br. at 12, 15-18. The government, however, fails to

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1/ The government also cites 26 U.S.C. § 7426(b), Gov. Br. at 11, but that section is irrelevant to this case.

2/ The government's lengthy recitation of the summons enforcement procedure, Gov. Br. at 13-15 & nn. 12-14, 17 n.16, while essentially accurate, does nothing to advance the government's position that this appeal is moot.

provide any explanation or hint as to how it managed to get from the first proposition to the second, other than to cite to those appellate court cases that have routinely and without examination accepted the proposition that compliance with a summons enforcement order moots an appeal. Gov. Br. at 12 & n.11; *see* Brief for the Petitioner at 35-40 (hereinafter "Pet. Br. at __") (detailing the development of the "majority" rule that compliance moots an appeal of a summons enforcement order).

The statement that the district courts "lack power to decide questions that are unrelated to the subject matter of the action upon which their jurisdiction is founded," Gov. Br. at 11; *see* Gov. Br. at 15, also does nothing to advance the government's position in this case, because the question decided by the district court here is *directly* related to the subject matter of the proceeding, *i.e.*, whether the summons should be enforced. Petitioner seeks to have the court of appeals rule only on precisely that subject matter -- *i.e.*, whether the district court erred in enforcing the summons. As long as the court may grant petitioner effective relief should petitioner prevail, the case is not moot. Pet. Br. at 14-16. Such relief is readily available through return of all copies of the tapes, no further disclosures, and no further use of them in the alleged investigation. Pet. Br. at 17-26.

The government erroneously relies on cases in which the taxpayer brings an affirmative suit seeking injunctive relief against the IRS, Gov. Br. at 15-16 (citing *Reisman* v. *Caplin*, 375 U.S. 440, 441-43 (1964); *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275, 1278-79 (7th Cir. 1984)),[3/] or in which

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3/ The government's discussion of the sovereign immunity of the United States, Gov. Br. at 11, is completely irrelevant to this case, in which the United States has brought suit against the Church; the Church has not sued the United States. For the same reason, the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), Gov. Br. at 16 n.15, has no application to this case. The Act, by its clear language, does not apply in circumstances, such as here, in which the *government* has brought suit, and the taxpayer merely defends itself. In appreciation of this fact, the government invokes the Act only in support of its discussion that the district court's jurisdiction is limited under sections 7402(b) and 7604(a); it does not argue that

the taxpayer seeks relief in a summons enforcement proceeding that is wholly unrelated to whether the summons should be enforced, *see* Gov. Br. at 15 (citing *United States* v. *Abrahams*, 905 F.2d 1276, 1286-87 (9th Cir. 1990) (refusing to enjoin IRS from interviewing attorney's clients), *United States* v. *Barrett*, 837 F.2d 1341, 1350 (5th Cir. 1988) (refusing to impose conditions on IRS access to summoned documents), *cert. denied*, 492 U.S. 926 (1989)).[4/] Such cases are inapposite to the issues raised in this government-initiated proceeding -- whether the IRS summons should have been enforced, and if not, whether the court of appeals may grant effective relief to the Church. This issue is at the core of the "subject matter" jurisdiction -- however "limited" the government wishes to characterize it -- that Congress granted to the federal courts.

The government's reliance on *United States* v. *Kis*, 658 F.2d 526, 533 (7th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982), is misplaced for several reasons. First, *Kis* itself suggests that the case would not have been moot had it involved compliance by a disinterested third party. *Id.* at 534; Pet. Br. at 27-28. Second, the Church does not seek the suppression of the tapes in some speculative future proceeding, but rather their return and no use or disclosure *now* in the putative ongoing IRS investigation. Pet.

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the Act itself precludes the relief the Church is seeking in its defensive posture. In *First Family Mortgage Corp.*, for example, the court held only that the Act barred a taxpayer from bringing an affirmative action to enjoin IRS use of documents it had obtained in a previously dismissed summons enforcement proceeding in which the taxpayer had failed to intervene prior to the IRS having obtained the documents and the dismissal of the proceeding. 739 F.2d at 1278-79. Each of the other Anti-Injunction Act cases that the government cites are affirmative taxpayer suits. These decisions have no bearing on the proper outcome in this matter.

4/ *But see United States* v. *Zolin*, 491 U.S. 554, 561 (1989) (affirming by an equally divided vote the district court's imposition of conditions on IRS use of the summoned documents). These conditions remain in effect. *See* Pet. App. 4a, 46a; *see also United States* v. *Rockwell International*, 897 F.2d 1255, 1261 (3d Cir. 1990) ("we find that IRS summonses may be enforced conditionally").

Br. at 35-36. Third, whether cases such as *Kis* were correctly decided is the very issue upon which this Court granted review.

Likewise wholly irrelevant to this case is the government's assertion that "the district court's jurisdiction in a summons enforcement proceeding does not include authority to supervise the summoned material once it has been supplied to the IRS." Gov. Br. at 16; *see id.* at 22, 26-27.[5/] Petitioner, however, has sought no such "continuing jurisdiction" or "supervision by the district courts," Gov. Br. at 26-27, in this appeal; it seeks only appellate review of an erroneous district court order. The IRS has had the tapes for fourteen months and has been free to use them as it sees fit (subject only to the unrelated conditions originally imposed by the district court and upheld by this Court). Such unsupervised use may continue unless and until the Church prevails. The Church seeks only that which the government itself concedes it is entitled -- a determination by the courts "whether [its] objections to the summons are valid." Gov. Br. at 17. The only point of disagreement is whether the Church is entitled to a determination in the court of appeals as well as in the district court. Nothing in Congress' jurisdictional grant suggests that there is to be no appellate review of an erroneous district court enforcement order. Thus, whether or not this post-compliance appeal is moot turns not on the subject matter of Congress' jurisdictional grant, but on traditional principles of mootness -- that there is a live concrete controversy between the parties and that effective relief remains available. *See* Pet. Br. at 11-16. As petitioner has explained, if its objections are valid, then the order of production should be reversed, and the effective relief that the Church seeks should be granted.

Throughout its brief, the government repeats like a mantra its conclusory, unexplained claim that once compliance has occurred, the proceeding is over and any appeal is moot. Repetition, however, does not substitute for explanation. Because petitioner seeks appellate review of a live concrete

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5/ In fact, of course, this Court has upheld just such jurisdiction in this very case. *See Zolin*, 491 U.S. at 561; note 4, *supra*.

controversy directly related to the "subject matter" of a summons enforcement proceeding, and because effective relief is available despite disinterested third party compliance, this appeal is not moot.[6/]

II. EFFECTIVE RELIEF IS AVAILABLE SHOULD THE CHURCH PREVAIL ON THE MERITS

The government erroneously claims that the Church contends that the case is not moot only because the courts can order the IRS to cease "use of" the information that has been produced. Gov. Br. at 18-22. Even assuming the government were correct that this particular relief is unavailable, the government completely ignores the Church's emphatic position that the courts may order *the return* of the documents, which would provide effective, even if not complete, relief. *See* Pet. Br. at 9-

6/ The government's claim that the Church appealed from a nonappealable final judgment of the district court, Gov. Br. at 6 & n.8, 10 n.10, 18-19 nn. 17-18, is difficult to comprehend. The court of appeals did not order the district court to enforce the summons; rather, it remanded with instructions to the district court to "admit the MCCS tapes into evidence, *subject to any objections the party's may make*." Pet. App. 15a (emphasis added). However confused the court of appeals was concerning the case's procedural posture, it clearly contemplated further proceedings *prior* to government access to the documents, including whether the government obtained the partial transcripts lawfully, an issue the court of appeals expressly declined to address, but which it certainly did not preclude the district court from considering. Pet. App. 15a n.2; *see* Pet. Br. at 5-7. The issue whether there remained a legitimate investigatory purpose for the summons, *see United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); 26 U.S.C. § 7602(a), did not arise until *after* the court of appeals remanded for further proceedings, when IRS agents testified in January 1991 that the civil component as well as the criminal component of the investigation had terminated. Pet. Br. at 7. The district court erroneously held that the court of appeals had determined these issues against the Church, albeit *sub silentio*, and refused to consider them, although it acknowledged that the court of appeals had not addressed these issues and that the court of appeals' opinion "may evidence a misunderstanding of what this case was about." Pet. App. 8a; *see id.* 9a-11a; Pet. Br. at 7-8. Thus, the government's contention that the Church seeks to relitigate issues previously decided against it in the court of appeals is simply wrong. In any event, whether the Church ultimately should prevail on the merits is not before this Court.

13, 15-17, 20-25, 28, 34, 38, 40, 42-44; *see United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 422 n.6 (1983) (appeal not moot when court "can grant partial relief"). The government's decision to ignore the availability of this form of effective relief is understandable in light of the numerous cases, cited in Pet. Br. at 17-25, that hold that the availability of effective relief through return of documents after they have been produced to the government prevents an appeal from being moot. *See, e.g., In re Grand Jury Subpoena Dated June 5, 1985 (Doe)*, 825 F.2d 231, 235 (9th Cir. 1987); *Cardwell* v. *Kurtz*, 765 F.2d 776, 779 (9th Cir. 1989); *FTC* v. *Ernstthal*, 607 F.2d 488, 489 (D.C. Cir. 1979); *Casey* v. *FTC*, 578 F.2d 793 (9th Cir. 1978); *FTC* v. *Gibson Products of San Antonio, Inc.*, 569 F.2d 900, 903 (5th Cir. 1978); *Atlantic Richfield Co.* v. *FTC*, 546 F.2d 646, 650 (5th Cir. 1977); *United States* v. *Waltman*, 525 F.2d 371, 373 n.1 (3d Cir. 1975); *FTC* v. *Browning*, 435 F.2d 96, 97-98 (D.C. Cir. 1970).

In the recent decision in *FTC* v. *Invention Submission Corp.*, No. 91-5174 (D.C. Cir. June 2, 1992) (1992 U.S. App. Lexis 12157), the court held, "ISC's compliance [with an FTC subpoena enforcement order] does not moot the controversy. As *the parties* pointed out in their briefs, if the subpoena were improper, the Commission could be ordered *to return responsive materials* and *to destroy any records derived from them*." Slip op. at 4 n.1 (emphasis added).[7/] In *Office of Thrift Supervision* v. *Dobbs*, 931 F.2d 956 (D.C. Cir. 1991), the court, in discussing whether a post-compliance appeal involving the giving of testimony was moot, stated, "In the case of records, a party may challenge a subpoena in an effort to *retrieve records* the government obtained through the subpoena. In such a case there remains a live controversy over the custody of the records." *Id.* at 959 (emphasis added); *see id.* at 958.

The government attempts to rebut the numerous cases holding a post-compliance appeal of an FTC subpoena enforce-

7/ Thus, at the same time the government has been asserting that this appeal is moot, it was conceding that the appeal in *Invention Submission* is not moot for the exact same reason that the Chruch has asserted that its appeal is not moot.

ment order not moot by inventing a spurious distinction between "investigative" and "adjudicative" subpoenas. Gov. Br. at 27-29 & n.25. According to the government, post-compliance appeals of adjudicative subpoenas are not moot, but such appeals of investigative subpoenas are moot. Unfortunately for the government, this distinction has no basis either in the cases or in mootness doctrine. *Invention Submission*, for example, involved an investigative subpoena, as the government concedes, Gov. Br. at 27 n.25, as did *Dobbs*, 931 F.2d at 957.[8/] Similarly, *Casey*, 578 F.2d at 796,[9/] *Atlantic Richfield*, 546 F.2d at 647, and *Browning*, 435 F.2d at 99, all involved investigative subpoenas.

In *Gibson Products*, the court distinguished between adjudicative and investigative subpoenas *solely* in the context of determining which procedural rules should apply in resolving whether the subpoenas were properly issued. 569 F.2d at 904.

8/ The government is wrong that the court in *Dobbs* drew a distinction between adjudicative and investigative subpoenas or that it noted such a distinction in *Gibson Products*, *supra*. Gov. Br. at 28 n.25. In fact, the court in *Dobbs* stated that it found no reason to distinguish "administrative" from "litigation" subpoenas for purposes of mootness. 931 F.2d at 959. The only distinction recognized in *Dobbs* was between the giving of testimony, which *Dobbs* held made an appeal moot, and the production of records. As noted, *Dobbs* recognized that post-compliance appeals involving records were *not* moot because the records could be ordered to be returned. *Id*. at 958-59.

9/ Contrary to the government's claim, Gov. Br. at 29 n.27, the court found the appeal in *Casey* was not moot because "we may yet afford the Union relief by preventing further disclosure or by requiring the FTC *to return records* wrongfully subpoenaed." 578 F.2d at 796 (emphasis added). As a wholly *separate* ground, the court found that the absence of verification of the authenticity of the documents also "suggest[s] that there still exists a controversy." *Id*. Thus, the government's suggestion that the case would have been moot had the documents been verified is wrong. Moreover, in *Casey*, the court could not have "reject[ed] the established rule" of the Ninth Circuit that post-compliance appeals of IRS summons enforcement orders are moot, Gov. Br. at 29 n. 27, because the *only* two Ninth Circuit cases on this issue were decided *after Casey*. *See United States* v. *Silva & Silva Accountancy Corp.*, 641 F.2d 710 (9th Cir. 1981); *United States* v. *Kersting*, 891 F.2d 1407 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 49 (1990).

This distinction in no way related to the court's prior holding that the appeal was not moot. *Id*. at 903. Indeed, the two cases cited by the court for this holding -- *Browning* and *Atlantic Richfield* -- involved *investigative* subpoenas. The court in *Gibson Products* explicitly found, as a sufficient and independent ground, that the case was not moot because the court could enter "an order requiring the FTC to return the subpoenaed documents." 569 F.2d at 903. No case has drawn the distinction imagined by the government between adjudicative and investigative subpoenas for purposes of mootness analysis. Resort to this nonexistent distinction does nothing but reveal the weakness of the government's claim that no effective relief can be granted petitioner and that this appeal is moot.

The effectiveness of ordering the government to return the tapes is proven by this very case, in which the government has twice previously been ordered to return its copies of the tapes, which it has done without any claim that its prior possessions rendered the case moot. Pet. Br. at 3-4, 6-7, 15-16. The government responds that its prior possessions did not moot the controversy because the government "returned the records to the district court without inspecting or making or keeping a copy of them." Gov. Br. at 5-6 n.7. Even assuming that, were this statement factually correct, these facts would somehow make a difference in terms of mootness analysis, on both occasions the government *did* make copies and inspect the tapes. Thus, both the district court and the state court orders that granted the government access to the tapes in January 1991 ordered the government to *inspect* and *copy* the tapes. *See* E.R. 41[10/] (Order on Remand, at 2 (C.D. Cal. Jan 17, 1991) ("respondent shall produce the original MCCS tapes . . . to [AUSA Robbins] for *inspection and copying*") (emphasis added)); E.R. 43 (Order to Unseal And Produce Exhibit Pursuant to Order on Remand, at 2, in *Church of Scientology of California* v. *Armstrong*, No. C420153 (Cal. Sup. Ct. Jan. 23, 1991) ("The Clerk of this court

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10/ "E.R." refers to Appellant's Excerpts of Record filed by the Church in the court of appeals.

shall produce Defendant's Exhibit 500-CCCCC (Folder containing two cassette tapes), under seal, for *inspection and copying* by [AUSA Robbins]") (emphasis added)); E.R. 75, item 77 (Government Notice of Lodging Items Under Seal, filed March 14, 1991 (returning to district court: "1. Seven sets of the MCCS tapes consisting of two cassette tapes in each set. 2. One computer disk. 3. One transcript.")). In its petition instituting this proceeding in January 1985, the government admitted that in November 1984 the state court clerk "had allowed the IRS agents *to inspect and copy* Exhibit 500-CCCCC, known as the 'MCCS tapes.'" E.R. 3, ¶ 7 (emphasis added); *see also* E.R. 72, unnumbered item (Reporter's Transcript of Proceedings of April 29, 1985, at 33-35). And relief in which the government does not keep a copy of the tapes is precisely the effective relief that petitioner seeks and which the district court has already twice ordered. Thus, an order requiring return of the tapes now would be identical to the two previous orders that the tapes be returned, which the government has conceded "reinstituted" "the controversy." Gov. Br. at 6 n.7.

The cases also reveal that the Church is entitled to a prohibition against further disclosure of the tapes should it prevail on the merits. In *Sells, supra*, this Court held that disclosure of grand jury documents to Justice Department Civil Division attorneys, pursuant to the terms of a district court order, did not moot an appeal of that order because "we can grant partial relief by preventing further disclosure." 463 U.S. at 422 n.6; *see* Pet. Br. at 18-19. The government's claim that *Sells* and *Doe, supra*, 825 F.2d 231, are inapplicable because they are grand jury, rather than summons enforcement, cases, Gov. Br. at 24-26, misses the point of these cases as it relates to mootness doctrine. The government continues to misconstrue *Sells* as involving "improper disclosures" by "offending officials," and that the appellate courts acted in their "supervisory" authority over "violations" of the grand jury process. Gov. Br. at 24-25; *see* Pet. Br. at 20 n.7. In *Sells*, however, there was no allegation that government officials were acting other than pursuant to an explicit district court order. Indeed, two years after the disclosures, there was nothing but speculative allegations that future

disclosures would occur. The *only* issue in that case was whether that disclosure order was in error, and if so, whether effective relief could be granted by the appellate court. Pet. Br. at 20 n.7; 463 U.S. at 422 n. 6.

Just as nothing in the mootness inquiry in *Sells* turned on the supervisory authority of the federal courts over "prosecutorial conduct," Gov. Br. at 25, petitioner here in no way seeks to have the courts "supervise" the IRS in this matter. Nor, as in *Sells*, must there be a certainty of future disclosures. The *only* issue is whether the district court's enforcement order was erroneous and, if so, whether the federal courts have the power at least to "grant partial relief." 463 U.S. at 422 n.6. As *Sells* makes clear, the federal courts clearly have that power. *See also United States* v. *Fischbach and Moore, Inc.*, 776 F.2d 839, 841 n.2 (9th Cir. 1985); *Casey, supra*, 578 F.2d at 796; Pet. Br. at 20-22.

The two cases the government cites for the erroneous proposition that disclosure to authorized persons, absent allegations of improper future disclosures, moots the controversy, Gov. Br. at 25, do not support the government's position. In *In re Grand Jury Investigation (McElroy)*, 718 F.2d 875 (8th Cir. 1983), the court found the appeal moot *not* because the disclosure had already occurred, but because the transcript at issue had already been returned to the district court, the state prosecutor had retained no copies, had initiated no criminal proceedings, and the government represented it would make no further use of the transcript absent a new court order. *Id.* at 876. Were the government to take each of these steps in *this* case, petitioner would then concede that its appeal is also moot.

Similarly, in *In re Corrugated Container Grand Jury*, 659 F.2d 1330 (5th Cir. 1981), the court held the appeal moot because "there can be *no further dissemination* of the transcripts" pursuant to the district court's order. *Id.* at 1331 (emphasis added). Here, however, the government retains the tapes, is free to continue to engage in future dissemination and disclosures in the course of its purported investigation, and has made no representation that it will not engage in such disclosures. The possibility of future disclosure here is no more speculative

than in *Sells*. Because the federal courts may order return of the tapes and no future disclosure of them if the district court's enforcement order was in error, this case is not moot. *Sells*, 463 U.S. at 422 n.6; Pet. Br. at 16-25.

In addition to requiring return of all copies of the tapes, and no further disclosure of them, the court may also order the IRS to make no further use of the tapes in its alleged ongoing investigation. The government's discussion of this issue is based on the faulty assertion that petitioner's defense of this proceeding constitutes a "premature" suppression motion concerning admission of evidence in a future proceeding. Gov. Br. at 18-22. A suppresion motion in a subsequent trial, however, is merely one form of possible relief. Its potential availability does not foreclose the relief petitioner seeks now, which is directed at the government's *present* retention and use of the documents in its putative ongoing investigation. If petitioner ultimately prevails, surely there is no injustice in preventing ongoing use of documents to which the courts have determined the IRS has no right. Pet. Br. at 35-36, 40-44. Thus, although *Gluck* v. *United States*, 771 F.2d 750, 754 (3d Cir. 1985), *United States* v. *Friedman*, 532 F.2d 928, 931 (3d Cir. 1976), and *Waltman*, *supra*, represent a minority view with regard to IRS summons enforcement cases, they are consistent with other cases that recognize that the availability of an order prohibiting further use of documents in an investigation prevents a post-compliance appeal from being moot. Pet. Br. at 17-18.[11/]

11/ The government's reliance on Judge Garth's dissent in *Gluck*, 771 F.2d at 759, 760 n.2, in which the judge rejects granting relief from the government's present possession and use of documents, is misplaced. Gov. Br. at 23, 32. Judge Garth is incorrect that the *act* of compliance renders an enforcement case moot. As the majority explained in *Gluck*, in a case such as *Vesco* v. *SEC*, 462 F.2d 1350, 1351 (3d Cir. 1972), it was the very act of disclosing the documents that gave rise to irreversible, irremediable harm to Vesco -- criminal liability under Swiss bank secrecy law. *See Gluck*, 771 F.2d at 754; Pet. Br. at 17. By contrast, the harm caused by the act of compliance in a typical summons enforcement case, such as here, can be undone at least partially by granting the relief requested by petitioner and which has been granted in the numerous decisions discussed herein and in Pet. Br. at 17-25.

In *Gibson Products*, for example, the court held the appeal not moot because it could order both return of the documents and "forbid use of the material in the adjudicatory hearing." 569 F.2d at 903. Although the *existence* of a hearing was not speculative in *Gibson Products*, whether the FTC in fact would have sought to introduce the documents into that hearing was no more certain than whether the IRS will seek to use these tapes in a future proceeding against the Church, the government's contrary assertion notwithstanding, Gov. Br. at 27-29. Had the FTC sought to introduce the materials, a suppression motion would have been just as available to Gibson Products as a suppression motion would be available to the Church. Yet, despite the potential availability of such a motion, the court in *Gibson Products* held the appeal not moot.

G.M. Leasing Corp. v. *United States*, 429 U.S. 338 (1977), upon which the government so heavily relies, Gov. Br. at 8, 18, 26, in fact supports petitioner's position. The petitioner therein had instituted an affirmative suit in which it sought relief from an illegal search and seizure, including return of documents, destruction of photocopies, and suppression of all derivative evidence obtained from the seized documents. *Id.* at 346. The district court ordered the return of the records and destruction of the photocopies "because *any use* of them would be illegal." *Id.* at 348 (emphasis added). In its discussion of the appropriate remedy, this Court noted that, pursuant to the district court's order, "the books and records *were returned*, and the photographs concededly have been destroyed [by the government]; that claim, thus, is moot." *Id.* at 359 (emphasis added). Nothing in this Court's decision called into question the propriety of that relief. This Court held only that "the suppression issue" involving the evidentiary fruits obtained from the seized documents should await a proceeding in which the government seeks to introduce *that* evidence. *Id.* at 359. At the least, *G.M. Leasing Corp.* endorses the authority of the courts to grant a party relief by preventing use in an ongoing investigation of documents to

which the government is determined not to be entitled. *Id.* at 348, 359.[12/]

The government asserts that it is "speculative" whether it will make any use of the tapes. Gov. Br. at 29. If the IRS, however, has no intent to use the tapes to determine whether to initiate a civil fraud action, then it is impossible to understand what right it had to the tapes in the first place, pursuant to *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). Moreover, the court of appeals in *Sells* rejected this precise argument "that any challenge to use of the material is premature. . . . This action is a proper means to prevent future disclosure before it occurs; the availability of a motion to suppress in future civil proceedings provides a remedy for improper disclosures that have already occurred." *In re Grand Jury Investigation No.* 78-184 (*Sells, Inc.*), 642 F.2d 1184, 1188 (9th Cir. 1981), *aff'd*, 463 U.S. at 422 n.6; Pet. Br. at 41. As the cases make clear, the potential availability of a suppression motion in a subsequent proceeding is merely one form of relief; it does not preclude petitioner's right to immediate relief should it prevail on the merits of the summons enforcement proceeding.

In *Donaldson* v. *United States*, 400 U.S. 517 (1971), for example, this Court did not hold that suppression "in any subsequent trial" was the *only* remedy available to a taxpayer in a third party summons enforcement proceeding. *Id.* at 531. Rather, it held only that the availability of such a remedy was sufficient to deny a taxpayer an absolute right to intervene in a third party IRS summons enforcement proceeding. *Id.* Congress, of course, by its enactment of 26 U.S.C. § 7609, modified this aspect of *Donaldson*. Had *Donaldson* held that suppression in a subsequent trial was the *only* remedy that the courts had jurisdiction to grant to an intervening taxpayer, as the government implies, Gov. Br. at 18, 30, then, presumably, Congress

12/ The government's reliance on *United States* v. *Blue*, 384 U.S. 251, 255 (1966), Gov. Br. at 19, is particularly perplexing. In *Blue*, the Court merely rejected the argument that a Fifth Amendment violation mandated dismissal of the indictment, rather than the standard remedy of suppression of the tainted evidence.

would have lacked the power under Article III to legislate an absolute right of taxpayer intervention in section 7609. As the cases show, and as Congress recognized in enacting section 7609, present retention, disclosure and use of information by the government in an ongoing investigation are themselves very real harms suffered by the taxpayer. Pet. Br. at 32-34, 41-44. The potential availability of a suppression motion in a subsequent proceeding is unresponsive to these present harms.

The government's "policy" arguments based on the asserted need for expeditious government access to summoned documents, Gov. Br. at 20-22, also have no relevance to a determination whether this appeal is moot. Furthermore, as petitioner has explained, nothing in a post-compliance appellate court review of a district court enforcement order interferes with or delays an IRS investigation, until and unless the district court order is held to be in error. Pet. Br. at 32-34, 41-44. In that event, it is difficult to comprehend the injustice in ordering that the IRS return and make no further use of the erroneously enforced documents.[13/]

13/ The government's accusation that petitioner has attempted to delay this investigation, Gov. Br. at 21, is both false and inappropriate. Petitioner asserted in good-faith an attorney-client privilege, upon which it prevailed in the district court, the court of appeals panel, and the *en banc* court, Pet. App. at 16a-46a. This Court rejected both the government's and the court of appeal's position, and adopted essentially the position of the district court and the three *en banc* dissenters, under which petitioner had also prevailed. *Zolin*, 491 U.S. at 571-72; Pet. App. 19a-26a, 45a. On remand, the court of appeals ignored the factfindings of the district court and the decision of the three Ninth Circuit judges who had reviewed the same evidence and found the tapes protected by the privilege. Pet. App. 13a-15a. The government apparently takes the position that *any* good faith assertion of a taxpayer's rights in a summons enforcement proceeding constitutes an improper attempt to "delay" an investigation. Fortunately, Congress has explicitly rejected this view. *See* 26 U.S.C. §§ 7402(b), 7604(a), 7609.

III. DISINTERESTED THIRD PARTY COMPLIANCE WITH A SUMMONS ENFORCEMENT ORDER DOES NOT MOOT A TAXPAYER'S APPEAL

The government once again misses the point in its superficial response to petitioner's explanation that, even if a *taxpayer's* compliance moots *his* appeal of a summons enforcement order, compliance by a *disinterested* third party does not moot the *taxpayer's* appeal. Pet. Br. at 25-34; Gov. Br. at 29-32. Inexplicably, the government asserts that petitioner contends that the decisions holding post-compliance appeals moot involve only taxpayer compliance. Gov. Br. at 30. In fact, petitioner acknowledged that eighteen (18) of 28 reported cases so holding involved disinterested third parties. Pet. Br. at 35; *id.* at 37-40. Indeed, the petition for certiorari, at 14-15, 19, explicitly noted the conflict in the circuits on precisely this issue, and acknowledged that only the Third Circuit had expressly adopted petitioner's position. *See* Pet. Br. at 18 n.6, 41. Thus, the government's mere recitation of cases that hold a taxpayer's appeal moot following disinterested third party compliance hardly advances the proper resolution of this matter. As petitioner has shown, these disinterested third party cases contain little or no analysis, are unreflectively derived from cases involving *taxpayer* compliance, and fail to address the issue of the availability of present effective relief. *See* Pet. Br. at 35-40.

A fundamental fallacy in the government's reasoning is revealed in the statement that the decisions which hold a taxpayer's appeal moot following disinterested third party compliance "rest on the same rationale underlying this Court's holding in *Donaldson*, that the taxpayer lacks sufficient interest to be allowed to intervene in a summons enforcement proceeding seeking records from a third party because the taxpayer's claims may be made in due course . . . in any subsequent trial." Gov. Br. at 30 (internal quotations and footnote omitted). Congress, however, modified *Donaldson* when it enacted 26 U.S.C. § 7609, precisely because Congress believed that a taxpayer has such a strong interest in a third party summons enforcement proceeding that his claims should not have to await

resolution in "due course . . . in any subsequent trial." *See* Pet. Br. at 32-34, 41-44. Thus, Congress has explicitly rejected the government's rationale for affirming those cases that hold a post-compliance taxpayer appeal moot following disinterested third party compliance.

In addition to the explicit holdings of the Third Circuit cases, petitioner noted that four other cases (not two, as the government asserts, Gov. Br. at 30), involving taxpayer or other interested party compliance, have indicated, without expressly so holding, that there is a distinction in cases involving *disinterested* third party compliance. *See* Pet. Br. at 26-29; *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720, 723-24 (1st Cir.), *cert. denied*, 449 U.S. 1021 (1980); *United States* v. *Kersting*, 891 F.2d 1407, 1411 n.9 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 49 (1990); *Kis*, 568 F.2d at 534; *Baldridge* v. *United States*, 406 F.2d 526, 527 (5th Cir. 1969) (Aldrich, C.J., dubitante).

The government chooses to ignore these courts' discussion of this distinction. Thus, it recites the holding of *Arthur Andersen*, *supra*, involving *interested* third party compliance, Gov. Br. at 31, but it acts as if that court never stated, "It would be unreasonable to expect individuals with no strong interest in resisting the subpoenas to expose themselves to contempt by refusing to comply" in order to preserve the issues for appeal. 623 F.2d at 723-24. Similarly, the government refuses to acknowledge that *Kersting* concurred in the distinction recognized in *Arthur Andersen*. *See* 891 F.2d at 1411 n. 9.

The government also incorrectly claims that petitioner is seeking some sort of exception to an otherwise moot case based on "compelling circumstances." Gov. Br. at 31 n.29. As petitioner has explained, it does not seek an *exception* to the mootness doctrine based on equity or reasonableness, but rather it seeks a holding that disinterested third party compliance does not remove the "concrete interest in the outcome of the litigation," *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 571 (1984), between the taxpayer and the government. Pet. Br. at 30-31. The question for this Court is not whether there should be an "exception" to the mootness doctrine, but rather

whether a proceeding *is* moot when there remains a live, concrete controversy between *the parties* and effective relief may be granted. The hypothetical availability of some future proceeding upon which the government places so much weight, Gov. Br. at 18-23, 26-32, is simply irrelevant to resolution of the present, concrete controversy -- whether the district court erred in ordering production of the summoned documents, and if so, whether effective relief may be granted.

CONCLUSION

For the reasons stated herein and in the Brief for the Petitioner, the judgment of the court of appeals should be reversed, and the matter should be remanded for resolution of the issues raised in the Church's appeal.

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Respectfully submitted,

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